

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

UNITED STATES OF AMERICA,

v.

GARY DON KIRKLAND (15),

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CASE NUMBER 6:07-CR-00082-JDK-JDL

**REPORT & RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE**

On February 22, 2019, the Court conducted a hearing to consider the government's petition to revoke the supervised release of Defendant Gary Don Kirkland. The government was represented by Jim Noble, Assistant United States Attorney for the Eastern District of Texas, and Defendant was represented by Ken Hawk, Federal Public Defender.

Defendant originally pled guilty to the offense of Conspiracy to Possess with Intent to Distribute at Least 50 Grams but less than 200 Grams of Methamphetamine, a Class B felony. The United States Sentencing Guideline range for this offense, based on a total offense level of 23 and a criminal history category of V, was 84 to 105 months. On October 21, 2008, District Judge Leonard Davis sentenced Defendant to 105 months imprisonment followed by 5 years of supervised release, subject to the standard conditions of release, plus special conditions to include financial disclosure, drug aftercare, and mental health treatment. On September 3, 2015, Defendant completed the term of imprisonment and began his term of supervised release. On May 18, 2016, Defendant's term of supervised release was revoked and Defendant was sentenced to 7 months imprisonment followed by 4 years of supervised release. On April 25, 2017, Defendant's term of supervised release was again revoked and Defendant was sentenced to

10 months imprisonment followed by 2 years of supervised release. On June 8, 2018, Defendant began his most recent term of supervised release. Additionally, on October 22, 2018, Defendant's conditions of supervised release were modified to include placement in a residential reentry center for 180 days and to take mental health medication as prescribed by a treating physician.

Under the terms of supervised release, Defendant was required to refrain from any unlawful use of a controlled substance. In its petition, the government alleges that Defendant violated his conditions of supervised release when he submitted a urine specimen, which tested positive for methamphetamine on September 14, 2018, October 8, 2018, and October 29, 2018. The government represents that Fifth Circuit case law permits a court to find that illicit drug use constitutes possession for the offense.

If the Court finds by a preponderance of the evidence that Defendant violated the conditions of supervised release when he possessed methamphetamine on September 14, 2018, October 8, 2018, and October 29, 2018, Defendant will have committed a Grade B violation. U.S.S.G. § 7B1.1(a). Upon finding of a Grade B violation, the Court shall revoke supervised release. U.S.S.G. § 7B1.3(a)(1). Considering Defendant's criminal history category of V, the Guideline imprisonment range for a Grade B violation is 18 to 24 months. U.S.S.G. § 7B1.4(a).

At the hearing, the parties indicated that they had come to an agreement to resolve the petition whereby Defendant would plead true to violating the conditions of supervision by committing the acts as described in Allegation 1 in the government's petition. In exchange, the government agreed to recommend to the Court a sentence of 18 months imprisonment, with no supervised release to follow.

The Court therefore **RECOMMENDS** that Defendant Gary Don Kirkland's plea of true be accepted and he be sentenced to 18 months imprisonment, with no supervised release to follow. The Court further **RECOMMENDS** that Defendant serve his sentence at FCI Texarkana, if available. The Court further **RECOMMENDS** that Defendant receive substance abuse treatment and counseling, if available. The parties waived their right to objections so this matter shall be immediately presented to the District Judge for consideration.

So **ORDERED** and **SIGNED** this 22nd day of February, 2019.



JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE